

ISSUANCE, REISSUANCE, AND MODIFICATION OF NATIONWIDE PERMITS—FINAL NOTIFICATION

Posted May 29, 1998

Nationwide permits (NWP) are a type of general permit used by the Army Corps of Engineers (Corps), under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, to authorize an entire category of dredge and fill activities throughout the nation. NWPs are designed to regulate certain activities having minimal adverse individual or cumulative environmental impacts with little, if any, delay or paperwork. To ensure that any adverse effects will be minimal so that the environment will be protected, NWPs contain specific project limitations. Failure to meet the conditions attached to a given NWP requires the applicant to secure either a regional general or an individual permit. DOE facilities are able to use NWPs if the permit conditions can be met.

On November 22, 1991, the Corps amended its NWP program regulations in 33 *Code of Federal Regulations (CFR)* 330 and reissued the then existing NWPs (some with modifications), issued ten new NWPs, and added new conditions to all of the NWPs. [See 56 *FR (Federal Register)* 59110.] The 36 NWPs issued or reissued in the notice became effective on January 21, 1992, and expired five years later on January 21, 1997. [One additional NWP (NWP 29) was issued on July 27, 1995 (60 *FR* 38650). It became effective on September 25, 1995, and had an expiration date of September 25, 2000.]

On June 17, 1996, the Corps proposed to reissue the existing nationwide permits and conditions, with some modifications, and to issue four new permits (61 *FR* 30779). One significant proposed modification contained new options for the threshold limits for NWP 26 which covers headwaters and isolated waters discharges. About 4,000 comment documents were received on the proposal. After reviewing and considering all the comments received, the Corps published a notice finalizing the proposal on December 13, 1996 (61 *FR* 65874). The final notice modifies and reissues the existing NWPs and conditions (see Tables 1–4 at the end of this document), issues two new NWPs, and changes the process by which NWPs will be promulgated. Significant issues raised in the notice are discussed below.

Relation to excavation rule. Many of the changes to the pre-existing permits result from an earlier modification of the definition of “discharge of dredged material” [33 *CFR* 323.2(d)] (58 *FR* 45008, August 25, 1993). The so-called “excavation rule” (also known as the Tulloch rule after the lawsuit that led to its adoption) clarified that regulated excavation activities include “any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation.” The changes made by the Corps to the pre-existing NWPs primarily harmonize those permits with the redefinition. (However, a lawsuit overturning the Tulloch rule has affected many of these NWPs.¹ For more details on the redefinition, see EH-41's Wetlands Update.)

¹ On January 23, 1997, a judge in the U. S. District Court for the District of Columbia ruled that the Corps and the Environmental Protection Agency had exceeded the scope of their statutory authority in adopting this rule because it went far beyond the intent of Congress in the CWA. The government has since filed a notice of appeal of that ruling with the U.S. Court of Appeals for the District of Columbia. (For the Corps' latest guidance on the Tulloch rule, see the World Wide Web at <http://wetland.usace.mil/tulloch.html>.)

New NWP. Based on the President's August 24, 1993, Wetlands Plan, two new NWPs have been added for other categories of activities having only minimal adverse effects to the aquatic environment. (For more details on the President's Wetlands Plan, see [EH-41's Wetlands Update](#).) The new "Moist Soil Management for Wildlife" NWP (NWP 30) authorizes activities necessary to manage, construct, and/or maintain habitat and feeding areas for wildlife on federally- or state-owned or managed property. The "Maintenance of Existing Flood Control Projects" NWP (NWP 31) authorizes the excavation and removal of accumulated sediment and associated vegetation in order to maintain existing flood control facilities. Two other proposed new NWPs, "Mining Operations" and "Food Security Act Minimal Effect Exemptions," were not finalized in this notice, but the Corps plans to repropose the latter.

NWP 26. The Corps has substantially modified NWP 26, "Headwaters and Isolated Waters Discharges." Isolated and headwater wetlands often play an important ecological role in protecting water quality, reducing flood flows, and providing habitat for many species of fish and wildlife. Concerns had been expressed that so many small developments had been allowed under NWP 26 that the individually minimal effects had resulted in cumulative adverse effects on the environment. Thus, NWP 26 has been changed from a geographic-based approach towards an activity-based approach. Consequently, the threshold limits of NWP 26 have been modified so the maximum fill allowable under it will be three acres, rather than the previously allowed ten, and a pre-construction notification (PCN) will be required for discharges over one-third of an acre, rather than the previously allowed three. Additionally, no activity that adversely effects more than 500 linear feet of a stream or creek bed can be authorized under NWP 26. The Corps has also extended the review period for NWP 26 actions from 30 to 45 days, has directed District and Division Engineers to further reduce impacts by requiring mitigation for most projects between one-third and three acres, and has shortened the re-authorized period for NWP 26 from five years to two. During that two-year period, the Corps plans to develop a replacement for NWP 26 and welcomes comments from the public during its development.

In response to a court order, on November 26, 1997 (62 FR 63224), the Corps published a notice asking for public comments by February 24, 1998, on three changes to NWP 26 that had been finalized in the December 13, 1996, *Federal Register* notice. The areas they were seeking comments on were (1) the expiration of NWP 26 on December 13, 1998; (2) the prohibition against filling or excavating more than 500 linear feet of stream bed under NWP 26; and (3) the prohibition against using other NWPs in combination with NWP 26 to authorize the loss of more than three acres of waters of the U.S. The Corps stated that by May 25, 1998, it would publish its final determination on these three issues in the *Federal Register*. In the interim all of the terms and conditions of NWP 26 as published in the December 13, 1996, *Federal Register*, including the three issues that are the subject of this notice, remain in effect.

Stacking. The Corps received many comments in favor of eliminating or restricting the use of more than one NWP for a single project (a practice referred to as "stacking") since it was felt that the practice could allow greater than minimal adverse effects to result. The Corps believes that under certain circumstances it is possible to use NWPs in combination and still have only minimal individual and cumulative adverse environmental effects. Thus, the regulations allow multiple use of NWPs, but each one only once for a single, complete project. Only seven of the 37 NWPs (numbers 3, 12, 13, 18, 19, 26, and 33) (see Tables 1 and 2 for their coverage) are generally used more than occasionally with other NWPs for authorizing projects. However, to ensure that impacts are minimal, the Corps has directed all District Engineers to conduct critical reviews of projects involving stacking. Also, to eliminate abuse while still allowing appropriate multiple use of NWPs, the Corps has restricted stacking by adding General Condition 15, "Multiple Use of Nationwide Permits." (See Table 3.)

Endangered Species Act Compliance. The Corps took additional steps to ensure that the NWP program complies with the Endangered Species Act (ESA). It directed its districts to develop local procedures in conjunction with the area offices of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure that the Corps' "affect" and "jeopardy" decisions are based on the best available information. To clarify that NWPs do not authorize the taking of federally listed threatened or endangered species, General Condition 11 has been modified to state that

fact. (See Table 3.) Also, the Corps will initiate formal programmatic consultation under section 7 of the ESA regarding the procedures associated with administering the NWP program as a whole. It anticipates that this consultation will be completed within two years. When that consultation is complete, the Corps will reevaluate all of the NWPs to determine what modifications, if any, are necessary. The results will be provided to the public by issuing a notice in the *Federal Register*. The Corps welcomes comments or information that might be relevant to the data collection and consultation process.

Regional conditions. In addition to the *Federal Register* notice, District Engineers were instructed to issue local public notices. District and Division Engineers may propose regional conditions or propose revocation of NWP authorization for all, some, or portions of the NWPs within their districts. Also, regional conditions may be required by states through Section 401 water quality certification or for state coastal zone consistency. Information on regional conditions and revocation can be obtained from the appropriate District Engineer, as listed in the December 13 *Federal Register* notice (61 FR 65912).

Previously authorized activities. Activities completed under a NWP that was in effect when the activity was completed continue to be authorized by that NWP. Projects begun prior to January 21, 1997, under previous NWPs will, except in certain cases, remain authorized as long as the activity is completed before January 21, 1998.

Procedural changes. The Corps has changed the procedural method whereby NWPs are published. NWPs will no longer appear in the Code of Federal Regulations, but will instead be published only in the *Federal Register* and announced, with regional conditions as discussed above, in public notices issued by the Corps' district offices.

Effective date. The 36 previous NWPs issued or reissued effective January 21, 1991, expired on January 27, 1997. All of the NWPs permits in the December notice were effective on February 11, 1997, and expire on February 11, 2002, (except for NWP 26) unless otherwise modified, reissued, or revoked before then. NWP 26 will automatically expire in two years (i.e., December 13, 1998). The rule as a whole became effective on February 11, 1997.

Additional information. NWPs and related supporting, including contact information for District Engineers, are available on the World Wide Web at <http://wetland.usace.mil/>.

For more information about nationwide permits, contact Lois Thompson, of DOE's Office of Environmental Policy and Assistance, EH-412, via telephone at 202-586-9581, or via e-mail at lois.thompson@eh.doe.gov.

| Table 1. Nationwide Permits Reissued on December 13, 1996, Without Change¹ | |
|--|--|
| Number | Permit Name |
| 1 | Aids to navigation |
| 2 | Structures in artificial canals |
| 3 | Maintenance |
| 7 | Outfall structures |
| 9 | Structures in fleeting and anchorage areas |
| 10 | Mooring buoys |
| 11 | Temporary recreational structures |
| 13 | Bank stabilization |
| 15 | U.S. Coast Guard approved bridges |
| 17 | Hydropower projects |
| 20 | Oil spill cleanup |
| 22 | Removal of vessels |
| 23 | Approved categorical exclusions |
| 24 | State administered Section 404 programs |
| 28 | Modifications of existing marinas |
| 36 | Boat ramps |
| 37 | Emergency watershed protection |
| 39 | {Reserved} |

¹ These permits remain the same as when they were issued on November 22, 1991, 56 *FR* 59110.

**Table 2. Nationwide Permits Issued/Reissued on December 13, 1996,
with Proposed Changes and/or Modifications and Clarifications**

| Number | Name | Comments |
|---------------|--|--|
| 4 | Fish and wildlife harvesting, enhancement, and attraction devices and activities | reissued with proposed changes and clarification |
| 5 | Scientific measurement devices | reissued with modifications |
| 6 | Survey activities | reissued with proposed changes and clarification |
| 8 | Oil and gas structures | reissued with proposed clarifications |
| 12 | Utility line backfill and bedding | reissued with modifications |
| 14 | Road crossing | reissued with modification |
| 16 | Return water from upland contained disposal areas | reissued with proposed changes |
| 18 | Minor discharges | reissued with proposed change |
| 19 | Minor dredging | reissued with proposed change |
| 21 | Surface coal mining activities | reissued with modifications |
| 25 | Structural discharge | reissued with proposed clarification |
| 26 | Headwaters and isolated waters discharges | reissued with substantial modifications (see text for details) |
| 27 | Wetland and riparian restoration and creation activities | reissued with changes |
| 29 | Single family housing | reissued with modifications |
| 30 | Moist soil management for wildlife | proposed new Permit A, issued as proposed |
| 31 | Maintenance of existing flood control projects | proposed new Permit D, issued with modifications |
| 32 | Completed enforcement actions | reissued with changes |
| 33 | Temporary construction, access, and dewatering | reissued with proposed changes |
| 34 | Cranberry production activities | reissued with modifications |
| 35 | Maintenance dredging of existing basins | reissued with clarifications |
| 38 | Cleanup of hazardous and toxic waste | reissued with clarification |
| 40 | Farm buildings | reissued with modification |
| Proposed A | Moist soil management for wildlife | issued as NWP #30 |
| Proposed D | Maintenance of existing flood control projects | issued, with modifications, as NWP #31 |

| Table 3. Nationwide Permit General Conditions¹ | | |
|--|--------------------------------------|--|
| Number | Condition | Comments |
| 1 | Navigation | |
| 2 | Proper maintenance | |
| 3 | Erosion and siltation | |
| 4 | Aquatic life movement | |
| 5 | Equipment | |
| 6 | Regional and case-by-case conditions | modified to clarify current practice |
| 7 | Wild and scenic rivers | adopted as proposed with addition of U.S. Fish and Wildlife Service as a federal management agency |
| 8 | Tribal rights | |
| 9 | Water quality certification | |
| 10 | Coastal zone management | |
| 11 | Endangered species | adopted with addition stating that authorization of a project by an NWP does not authorize the taking of an endangered or threatened species |
| 12 | Historic properties | |
| 13 | Notification | adopted with changes from proposal |
| 14 | Compliance certification | new requirement |
| 15 | Multiple use of nationwide permits | new requirement (see text discussion about “stacking”) |

¹ Adopted without change from 1991 version unless otherwise indicated under comments.

| Table 4. Nationwide Permit Section 404 Only Conditions¹ | | |
|---|----------------------------------|--|
| Number | Condition | Comments |
| 1 | Water supply intakes | |
| 2 | Shellfish production | |
| 3 | Suitable material | adopted with addition of asphalt to list of unsuitable materials |
| 4 | Mitigation | adopted with proposed change to allow off-site mitigation in lieu of on-site mitigation, if it is the environmentally preferred option |
| 5 | Spawning areas | |
| 6 | Obstruction of high flows | |
| 7 | Adverse effects from impoundment | |
| 8 | Waterfowl breeding areas | |
| 9 | Removal of temporary fills | |

¹ Adopted without change from 1991 version unless otherwise indicated under comments.